NSW Crest

District Court
New South Wales

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R v Zoghbi [2022] NSWDC 219
Hearing dates:
18 March 2022
Date of orders:
17 June 2022
Decision date:
17 June 2022
Jurisdiction:
Criminal
Before:
Sutherland SC DCJ
Decision:

At [262]-[265]

Catchwords:

CRIME – Sentence – Federal Offences – Conspiracy to defraud the Commonwealth – s 135.4(1) Criminal Code – Defrauding the Pharmaceutical Benefits Scheme – Ongoing course of conduct – Falsifying prescriptions – Loss to Commonwealth of $19.35 million

Legislation Cited:

Court Suppression and Non-Publication Orders Act 2010 (NSW)

Crimes Act 1914 (Cth)

Criminal Code Act 1995 (Cth)

Proceeds of Crime Act 2002 (Cth)

Cases Cited:

Canning v Northcott (unreported, WASC Library Number 7194, 14 July 1988)

Corbett v R (1991) 52 A Crim R 112

Dickson v R [2016] NSWCCA 105

DPP (Cth) v Phan [2016] VSCA 170

DPP v Golic [2014] VSCA 355

DPP v Hamman (unreported, NSWCCA, 1 December 1988)

El-Chaar v R [2007] NSWCCA 16

El Rakhawy v R [2011] WASCA 209

Greentree v R [2018] NSWCCA 227

Issakidis v R [2019] NSWCCA 302

Ly v R [2014] NSWCCA 78

Markarian v The Queen [2005] 228 CLR 357

Neil Harris (a pseudonym) v Regina [2019] NSWCCA 236

O'Meara v R [2009] NSWCCA 90

Quetcher v R [2010] NSWCCA 257

R v Anthony James Dickson (No 18) [2015] NSWSC 268

R v Buckman [2016] QCA 176

R v Cartwright (1989) 17 NSWLR 243

R v Cox; R v Cuffe; R v Morrison [2013] QCA 10

R v Dunn (No 9) [2014] WASC 61

R v Host [2015] WASCA 23

R v Jafari [2017] NSWCCA 152

R v Price [2008] QCA 330

R v Van Tung Luu (unreported, NSWCCA, 7 December 1984)

Ryan v R [2001] HCA 21; (2001) 206 CLR 267

Stitt v R (1998) 102 A Crim R 428

The Queen v Kilic [2016] HCA 48; 259 CLR 256

Totaan v R [2022] NSWCCA 75

Veen [No 2] [1988] HCA 14; (1988) 164 CLR 465

York v The Queen (2005) 225 CLR 466

Z v R [2014] NSWCCA 323

Category:

Sentence

Parties:

Crown

Hamza Amin Zoghbi

Representation:

Counsel:

P McGuire SC with B Narula

C P O'Donnell SC with S Jeppesen

Solicitors:

Crown: Commonwealth Solicitor for Public Prosecutions

Defence: R Rahal, Cambridge Law

File Number(s):

2018/00216237

Publication restriction:

I make a suppression order and non-publication order pursuant to the provisions of s 7 of the Court Suppression and Non-Publication Orders Act 2010 (NSW) with respect to paragraphs 240 – 242 of these Remarks.

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DETERMINATION

sentence

1. Hamza Zoghbi appears for sentence with respect to one offence, shortly described as conspiracy to defraud the Commonwealth. The offender was found guilty by a unanimous jury verdict on 23 April 2021 following a trial which occupied some 37 sitting days.

2. The indictment charged that the offender:

"Between about 30 November 2013 and 25 March 2015 at Hurstville, and elsewhere in the state of New South Wales, did conspire with Yaakop Youssef ("**Youssef**") and divers' others with the intention of dishonestly obtaining a gain from a third person, namely the Commonwealth, which is a Commonwealth entity, contrary to subsection 135.4(1) of the Criminal Code (Cth)."

3. The maximum penalty with respect to this offence is 10 years imprisonment and/or a pecuniary penalty up to $102,000.

4. The maximum penalty operates as an effective "*yardstick*" in determination of an appropriate sentence and provides a basis for comparison between an individual case and a so-called "*worst case*" (see ***Markarian v The Queen*** [2005] 228 CLR 357 at [31]).

5. The offender pleaded not guilty and a jury was empanelled on 1 March 2021. Following a number of interruptions to the progress of the trial, a verdict of guilty was ultimately returned on 23 April 2021.

6. The offender went into custody on that date and a variety of different circumstances have occasioned the not insubstantial delay in passing sentence since that time.

7. The ultimate defrauding in the present matter was of some $19.35 million in fraudulent claims on the Pharmaceutical Benefits Scheme over a period of approximately 15 months.

FACTUAL BACKGROUND

8. The offender Hamza Zoghbi and his co-offender Yaakop Youssef (referred to as *Jacob* Youssef) were both qualified and registered pharmacists. In June 2013 they purchased an existing pharmacy in Westfield Shoppingtown at Hurstville. They jointly set up a company called Pharmacy Depot Hurstville and both became directors of the company. They renamed the pharmacy accordingly and each contributed an equal amount for the purchase of the pharmacy and its stock.

9. The ultimate purchase price was $500,000 for the business of which $200,000 was for goodwill and $300,000 for equipment. An additional amount of approximately $500,000 was paid for stock at hand in the pharmacy.

10. Zoghbi and Youssef each borrowed $342,500, i.e. a total of $685,000, from the ANZ bank to fund the purchase. The balance of the purchase price was paid by each of the co-offenders equally.

11. Although the contract for the purchase of the pharmacy was signed in June 2013, settlement did not take place until 26 September 2013.

12. Prior to that date approval had been obtained from the Pharmacy Council of NSW for the change of ownership and change of name of the pharmacy. The two offenders also made application and received

approval for the online claiming of benefits pursuant to the Commonwealth Pharmaceutical Benefits Scheme.

13. The Pharmaceutical Benefits Scheme (PBS) was a program conducted by the Australian Government which subsidised the cost of prescription medicines for Australian citizens and residents. International visitors from overseas countries with which there was a reciprocal arrangement were also eligible to receive the benefit of the subsidy.

14. Where a particular prescription medication was approved for placement on the Pharmaceutical Benefits Scheme, the patient was required to pay a specified contribution whilst the Government contributed the difference between the specified contribution and the actual cost of the prescription medication. In 2013 and 2014 the contribution required to be paid by the patient was approximately $37. It was substantially less if the patient was a concession cardholder.

15. While many medications placed on the PBS required a comparatively modest contribution by the Government under the subsidy scheme, other prescription medicines which might be required for rare or uncommon diseases were comparatively very expensive. Such drugs or prescription medications, if approved for placement on the PBS, required very substantial contribution from the Government. On occasion, such government contribution might run into the hundreds or even thousands of dollars over the specified contribution required to be paid by the patient.

16. The process whereby a pharmacy could participate directly in supplying prescription medicines pursuant to the PBS required the pharmacy to be registered with the Commonwealth Department of Health (or Department of Human Services as it was subsequently called) as an approved supplier, and for the pharmacy to be equipped with the relevant prescription dispensing software and computer connections so that the transaction was recorded electronically with the Department of Health.

17. Pharmacy Depot Hurstville obtained the requisite registrations and approvals and was equipped with the relevant computer and dispensing software which enabled it to participate in the PBS.

18. Notwithstanding that a substantial part of the Scheme functioned electronically, at the time Pharmacy Depot Hurstville commenced operations in 2013 the physical paper prescriptions which had been brought to the pharmacy by the patients or customers for the purpose of obtaining the prescribed medication were required to be bundled up and physically forwarded to the Department together with a reconciliation or claim form with respect to the medications which had been supplied.

19. The physical lodgement of these documents was a necessary step in the administration of the Pharmaceutical Benefits Scheme. In addition to being a necessary step in the payment of a claim for the subsidy payment from the government, the physical documentation was available in the circumstances of an audit being carried out with respect to claims which had been made.

20. The evidence adduced at trial focused, to a considerable degree, on extremely rare genetic metabolic disorders. In simple terms, there are a number of different genetic disorders whereby a person's body is unable to metabolise protein and hence unable to create different types of amino acids and enzymes which are fundamental to the growth and development of the human body and its organs. Such disorders are tested for at birth. If left untreated the conditions can result in permanent neurological damage or, in some instances, premature death.

21. Thankfully, medication has been developed for such conditions which enable a sufferer to be able to live a normal life. The conditions are not curable and a person suffering from these rare metabolic disorders is required to take the prescribed medications throughout their life.

22. The different requisite medications are extremely expensive and as a consequence of having been approved to be supplied pursuant to the Pharmaceutical Benefits Scheme, are heavily subsidised.

23. The rarity of such disorders in the community was the subject of detailed evidence in the trial from Professor Carolyn Ellaway. The professor, a recognised expert with respect to genetic metabolic disorders, gave evidence that there were only about six or seven paediatric metabolic specialists in the entire country, and only two adult metabolic specialists. Worldwide some 40 different metabolic disorders have been identified, numerous of which have never been seen in Australia. It is not necessary for present purposes to descend into the minutiae of the detail regarding the different types of disorders which were described in her evidence.

24. It suffices to note that the incidence of one of the more commonly encountered metabolic disorders, phenylketonuria, (referred to as PKU) is detected in newborn babies at a rate of approximately one in 10,000 births. Given a birth rate in New South Wales of approximately 100,000 new births per annum, the medical profession might only see approximately 10 babies born annually with this particular disorder.

25. Professor Ellaway described various other variations of metabolic disorders which were even more rare with an incidence of approximately one in 100,000 births.

26. Part of the significance of her evidence was that many medical practitioners and indeed many pharmacists were unlikely to have encountered either the disorders themselves or the relevant prescription medications used to treat such disorders.

27. The reason that much of the evidence at trial focused on the prescription medications used to treat such disorders arose from the fact that of the total amount of money defrauded during the course of the conspiracy, namely about $19.35 million, approximately $18.5 million related specifically to prescription medications of the kind utilised to treat these rare metabolic disorders.

28. A single company, Vitaflo, was the sole distributor in Australia of the vast majority of prescription medications used in the treatment of the various rare metabolic disorders.

29. I am satisfied beyond reasonable doubt that the so-called "light bulb" moment and the realisation that very substantial "reimbursements" could be obtained for the expensive medication supplied by Vitaflo, occurred when a legitimate prescription for such a product was lodged at the pharmacy at Hurstville on about 30 November 2013. Knowledge of the way in which the system worked enabled the falsification of that prescription by adding notations purporting to represent that the medical practitioner had authorised some five repeats. The Crown addressed the jury as this incident being the one that "*starts the ball rolling*" and the ease with which such substantial funds were able to be procured under the PBS by simply adding unauthorised repeats to the face of the prescription, gave rise to the continuing implementation of the conspiracy.

30. The various fraudulent claims which followed were categorised in the trial by drugs being described as "*Vitaflo*" or "*non-Vitaflo*" products. In the course of the ongoing conspiracy, the conspirators submitted claims for PBS items which had not been supplied and which were intermingled with legitimate PBS claims regarding medications and drugs which had in fact been supplied.

31. The pharmacists had an intimate knowledge of the PBS systems which the evidence at trial established: "*relies totally on the integrity and honesty of the pharmacist to make an accurate claim for what they've supplied*" (evidence of Department of Human Services Compliance Pharmacist, Ms Matchett, at TT135). The steps taken to give effect to the aims of the conspiracy were physically carried out by both the present offender, his now absent co-offender, Mr Youssef, and by Youssef's sister, Zeinab Youssef, who clearly assisted in facilitating the creation of false documents. The various conspirators made fraudulent additions of both Vitaflo and non-Vitaflo drugs to legitimate prescriptions and also generated unauthorised repeats to otherwise legitimate prescriptions. This intermingling rendered less likely that any audit would necessarily detect the falsity of the claim. The conspirators variously attempted to mimic the handwriting of prescribing doctors in making fraudulent additions to handwritten prescriptions which created a false appearance of legitimacy.

32. A computer software system (MINFOS) produces pharmacy dispensing stickers with the initials of the dispensing pharmacist, which stickers are placed onto the paper prescription from a doctor and, in theory, on the box or bottle of the dispensed medication or drug. Numerous of the falsely claimed and purportedly dispensed drugs contained initials of employed pharmacists at the Hurstville pharmacy who were not part of the conspiracy and had not dispensed the particular medications, nor had they been part of the fraudulent manufacture of the dispensing stickers.

33. I am satisfied that although some occasions may have been inadvertent, the frequency with which the purported dispensing pharmacist was wrongly identified supports a conclusion that this was intended to generate uncertainty about the identity of any pharmacist who was purported to have dispensed fraudulent items and hence increased the complexity which would be involved in directly linking the purported and fraudulent dispensing to the actual conspirators. Further manipulation of the MINFOS software permitted the alteration of the dates of prescriptions which further provided the ability to confuse and cover up periods of offending.

34. Ultimately, the conspirators obtained $19,345,614.78 which related to approximately 5,500 false prescriptions submitted in tranches of 29 false claim forms submitted to the Pharmaceutical Benefits Scheme.

35. The funds fraudulently obtained were received directly into an ANZ bank account which had been set up by the two conspirators in September 2013. The illegitimate funds were subsequently transferred into the co-conspirators' personal accounts and accounts associated with them, or used to purchase property directly from that ANZ account.

36. A total of $4.58 million of the fraudulent funds were received by the present offender or by members of his family. As at the time of him apparently fleeing Australia for Beirut, a total of $3.4 million had been received by Youssef or members of his family. This amount included $558,000.00 received by Youssef's sister, Zeinab.

37. The conspiracy and the making of fraudulent claims on the PBS continued on occasions when one or other of the conspirators was overseas. On one occasion, the present offender was overseas while Youssef remained in Australia. During that period of time, some $423,497.00 arising from fraudulent claims were made. On a different occasion, while Youssef was overseas and the present offender Mr Zoghbi remained in Australia, a total of $1.65 million was fraudulently claimed with respect to drugs which had never been supplied.

38. In the submission of the Crown, the present offender was the main conspirator. The Crown addressed on the basis that Zoghbi was the "*prime mover*" and that on the available evidence, he had received the "*lion's share of the money*." The Crown, in its closing, put to the jury at TT2075:

"You will be satisfied that the main conspirator, the main person pushing the fraudulent button, the computer… was Mr Zoghbi."

39. On behalf of the offender, it was submitted that such a finding would not be open to the court beyond reasonable doubt. The basis for that submission was that the arithmetical approach indicated by the Crown was said to be flawed. Evidence that Jacob Youssef had been in the process of purchasing a $4 million property in the name of his wife was pointed to to support an inference that an additional $4 million would have been drawn by Youssef from the funds which remained in the joint ANZ account of the pharmacy. The defence submission developed in detail factors which were said to point to Jacob Youssef being the more senior partner in the conspiracy.

40. A significant aspect of the defence submission relies upon a proposition that the computer software utilised in dispensing was able to be logged into remotely. I am not satisfied of that fact on the basis of all of the evidence led in the trial, including particularly the evidence of Mr Mortimer.

41. However, whilst I am ultimately of the view that there is considerable force in the Crown's submission in this regard, I am ultimately not satisfied beyond reasonable doubt that Zoghbi was necessarily the "*prime mover*". The fact that he had received a greater proportion of the funds as at the time of the police search of the pharmacy must be tempered by the fact of the larger quantum in the joint ANZ account which had not yet been distributed. I should add for completeness that I am not satisfied on the balance of probabilities that Youssef was the so-called "*prime mover*", despite the assistance provided by his sister.

42. I view each of the present offender, Zoghbi, and the absent Youssef as being co-conspirators and equally complicit in the ongoing scheme.

43. The evidence at trial relating to the transfer of the fraudulently obtained funds into the offender's personal bank accounts revealed descriptions utilised in the accounting records of the pharmacy which were completely deceptive and gave a false appearance of legitimacy. These included payments described as "*Pharmacy Depot Hamza loan*"; "*Sweetplus*"; "*Sweetplus Wholesale*"; and other similar false descriptions.

44. The present offender, having come from employment as a pharmacist prior to the conspiracy where he had been earning approximately $100,000 per year, during the approximate 15 months of the conspiracy was withdrawing on average approximately $290,000 per month.

45. His use of the proceeds of the fraud included the cash purchase of a home in Sans Souci for approximately $3.125 million; the purchase or lease of a number of luxury motor vehicles; and the purchase of extravagant designer brand items, including Louis Vuitton, Gucci, Burberry, Hermes, Camilla et al, being items of jewellery, watches, clothing, and handbags.

46. A family holiday to Hawaii and Los Angeles was undertaken at a cost of almost $250,000. In addition, a pre-existing home loan of in excess of $300,000 was discharged and an amount of approximately $150,000 was transferred to his parents.

47. The Crown identified six categories of overt acts which the court would find established beyond reasonable doubt. I am satisfied to that requisite standard that the offender himself participated in each of these categories and that he was aware of the carrying out of such tasks by his co-conspirator and/or members of Youssef's family. The jury would similarly have been satisfied of such categories. Those identified by the Crown are:

    1. Making thousands of unauthorised additions to prescriptions involving both Vitaflo and non-Vitaflo products to give the false appearance that the medicines had been dispensed;

    2. Generating thousands of unauthorised repeat prescriptions involving both Vitaflo and non-Vitaflo products to give the false appearance that they had been supplied;

    3. Entering false details into the PBS online claiming system on thousands of occasions;

    4. Adding thousands of false dispensing stickers onto original prescriptions and repeat prescriptions, as well as stickers stating "*Immediate Supply Necessary*" giving the false appearance that the high PBS reimbursement medicines had been supplied and that such immediate supply was authorised by the medical practitioner or dispensing pharmacist;

    5. Inserting false details on 29 Claim for Payment Forms, many of which were handwritten by the offender and assigned by the offender;

    6. Sending, or causing staff of Pharmaceutical Depot Hurstville (PDH) to send, claim forms together with false prescriptions and repeat authorisations to the Commonwealth to receive reimbursement payments to which PDH was not entitled.

48. I will deal with an assessment of the objective seriousness of the offending when I come to deal with the specific factors set out in s 16A of the *Crimes Act 1914* (Cth). It suffices to note in passing that the

Crown's submission was that the offence falls towards the high end of objective seriousness. The defence, on the other hand, submits that the offending falls within the middle of the range of objective seriousness.

SUBJECTIVE CASE FOR THE OFFENDER

49. On behalf of the offender, a Defence Tender Bundle was filed and tendered in advance of the hearing. The bundle was marked as Exhibit #6. It included:

1. An affidavit of Naima Wahab, the offender's wife, affirmed on 28 January 2022;

2. A report of Dr Antony Henderson, Consultant Forensic Psychiatrist, dated 4 October 2021;

3. a report from Dr Richard Wu, Consultant Psychiatrist dated 17 October 2021;

4. A character reference from Mohamed Charchouh, Community Centre Manager, United Muslims of Australia, dated 23 September 2021;

5. A letter from Imam Mouhamed Sari, Islamic Chaplain at Silverwater MRRC, (undated);

6. A number of documents produced under subpoena by the Australian Federal Police including orders and documents relating to Proceeds of Crime proceedings in the Supreme Court of NSW.

50. An affidavit from the offender himself was also tendered at the hearing, having been affirmed that day, 18 March 2022. The affidavit, in short, set out various difficulties that the offender had suffered whilst in custody as a consequence of Covid – 19 restrictions, and apparent problems with obtaining timely medical and health assistance. Numerous annexures included diary notations recorded by the offender during his time in custody as well as copies of requests for nursing or other medical assistance and the provision of medications. The affidavit was marked Exhibit # 7 in the sentence proceedings.

51. The offender was called for cross-examination on his affidavit. (Transcript 18 March 2020; T 10 – T 35) In addition to the contents of his affidavit, evidence was adduced that the offender himself had tested positive to Covid-19 on 28 February 2022.

52. Senior Counsel for the Crown, in cross-examining the offender, first dealt with the topic of the delay which had apparently occurred with respect to the offender being provided with an asthma puffer following his incarceration. The Crown adverted to the circumstance that the offender had given no indication, on the forms completed at the time of his admission, of any need for asthma medication and that he at no time either prior to or since his entering into custody had suffered an asthma attack.

53. However, despite the delay following numerous requests for the provision of such medication by the offender, he had subsequently been provided with a prescription-only Schedule 4 Symbicort puffer. The offender agreed that that was an adequate medical response to his request for asthma medication. He had also subsequently been provided with Ventolin, for which no prescription was necessary.

54. The offender also agreed that he had not given any indication on those admission forms of any difficulties that he suffered with his mental health.

55. Senior Counsel for the Crown next challenged the assertions in the offender's affidavit with respect to the amount of telephone contact that he had been able to access whilst in custody. The volume of telephone contact was objectively established in material tendered by the Crown which had been provided by Corrective Services.

56. The offender agreed that it was "*possibly*" correct that in the 283 days that he had been in custody to that point in time, that he had been able to have 1173 non-legal telephone calls with friends and family (or approximately four per day on average) of which some 661 (or approximately two per day) had been with

his wife. These non-legal calls amounted to some 101 hours on such calls. In addition, there had been 63 telephone calls with his legal advisers amounting to some six hours in time.

57. The offender agreed that as a consequence of one of his jobs being that of a sweeper he was able to access telephone calls at times when other inmates were in lockdown. He said that when he had a "*chance*" he would make such access a priority.

58. In further cross-examination of the offender he adhered to the account of traumatic events in Lebanon which he said had occurred when he was respectively 9 and then 13 years of age, and which he had recounted to the psychiatrist, Dr Henderson. In short, he described having witnessed a man being shot in the head and then having been kidnapped and questioned when he was 9 years of age and subsequently having had to seek refuge in a bunker during Israeli bombing when he was 13. He was questioned about the possibility of corroboration of these accounts and the offender claimed that his cousin who had been with him at the age of 9 was no longer alive. He said that his father did not know the full detail of the first incident although his parents had allegedly been with him at the time of the second incident. He claimed that his cousin had told him not to tell his father about the full detail of the first incident when he was 9. He agreed that his parents were still alive.

59. He said that he had not instructed his lawyers to seek to get additional evidence to support his account of what he claimed had happened in Lebanon.

60. With respect to his drug abuse, the offender said that he had used drugs throughout his association with his co-offender, Jacob Youssef. He said that his drug use was at its peak in 2015, 2016 and 2017. It is appropriate to note in passing that the search warrant at the offender's pharmacy had taken place in March 2015.

61. The offender denied exaggerating either his symptoms or his history to Dr Henderson. He did, however, agree that there were aspects of the financial dealings which had been adduced in the trial which he did not discuss with Dr Henderson.

62. He agreed that although he could not be a registered pharmacist, there were a variety of positions in a pharmacy, including being a manager, a dispensing technician, a pharmacy assistant, or working in front of house, as Mr Youssef had done at the Pharmacy Depot Hurstville, which he might be able to pursue after his release.

63. As indicated earlier, included in the Defence Tender Bundle (Exhibit # 6) was an affidavit from the offender's wife, Naima Wahab. In that affidavit, Mrs Wahab deposed that whilst she had not witnessed her husband suffer an asthma attack, she was aware that he suffered from asthma and that he utilised a Ventolin asthma puffer regularly. Mrs Wahab deposed that her understanding was that the offender was first diagnosed with asthma as a child. Annexed to her affidavit was a letter from a doctor in Lebanon dated 16 November 2021 confirming that the doctor had treated the offender for chronic asthma during his time in Lebanon between 1995 and 1997 when he was aged approximately 12 to 14.

64. Mrs Wahab also annexed to her affidavit a copy of hospital records obtained from Westmead Hospital dated 2 June 1988 indicating that the offender had been treated as an outpatient at the hospital for symptoms relating to asthma when he was 5 and a half years of age on 2 June 1988. Those notes indicate that his parents had taken him to Emergency at the hospital with a two-day history of symptoms and increasing respiratory distress despite appropriate oral medication. The notes describe him as a recently diagnosed asthmatic. The notes indicate the attendance of the child with his parents at approximately 5am, which is indicative clearly of concerned parents with a child who was wheezing. The hospital staff diagnosed asthma of moderate severity and prescribed appropriate medication. The child improved with a nebuliser and the wheeze diminished significantly. The notes disclose: "*Parents prefer to take child home and continue oral salbutamol but return if deterioration*."

65. The notes and medical report from Lebanon clearly indicate that the offender was diagnosed with and has suffered from asthma. The absence of any subsequent attacks or any return to hospital would tend to suggest that the asthma has been well managed into his adulthood.

66. Such a conclusion is buttressed by a further annexure to Mrs Wahab's affidavit, namely a letter dated 7 September 2021 from a pharmacy at Chester Hill confirming that the offender has purchased Ventolin for the treatment of chronic asthma on a regular basis from that pharmacy. Presumably the necessity to purchase from a retail pharmacy is something which is likely to have arisen upon his cessation of employment as a pharmacist himself.

67. A further series of patient self-referral requests produced from Justice Health indicate that between 27 August 2021 and at frequent occasions until 1 October 2021, the offender has regularly and consistently requested asthma puffer medication whilst he has been in custody. Those requests indicate clearly that he had requested such medication when he first went into the Metropolitan Reception and Remand Centre at Silverwater in April 2021 and that at least up to 1 October 2021 such medication had not been provided.

68. Mrs Wahab's affidavit next raised the topic of self-medication and drug abuse by the offender. Prior to the Australian Federal Police search of the offender's home on 25 March 2015, Mrs Wahab said that there were occasions when she would find Endone tablets in their bed. Endone is the brand name of a manufactured form of Oxycodone which is a narcotic analgesic used for pain relief. Mrs Wahab said that she would find Endone, in her words, "*all over the place*." She said that at the time she did not think much of it because it was one pill here or there. She said, however, that the extent of her husband's abuse of Endone became more obvious later.

69. She formed the view that, at one stage, she believed he was having a box per day. She described an occasion in about 2015 sometime after the AFP search that they were staying with a group of other people at a hotel on the Gold Coast. She described the offender waking up in the middle of the night hallucinating. She said he did not know where he was and was screaming at about 3am. She described him going to the balcony and threatening to jump off.

70. Mrs Wahab described an incident in early 2017 when he fell asleep whilst driving her and their son in the car. She discovered boxes and boxes of empty packets of Endone in the vehicle and told him to fix his dependency or to not come back.

71. She also described a later occasion when he concealed Endone down his pants when she confronted him. She described kicking him out of the house and the offender going and staying in a hotel. Mrs Wahab's brother spoke to the offender and told him that his wife would only accept him back if he went to rehabilitation.

72. The offender attended, together with his wife, at a rehabilitation centre in Thailand in August 2017.

73. A discharge report dated 25 August 2017 described a history of drug abuse including Oxycontin and benzodiazepines. It is noted that Oxycontin is another trade name for the drug Oxycodone. The discharge report indicated that Mrs Wahab had answered a family questionnaire which had been processed in an individual session. The report noted that the offender had embraced the role of a "*family success story*" which was noted might play against him if he was not able to be detached from this role and to lower his own expectations of maintaining that role.

74. The report noted that his "*profession as a pharmacist and his addiction to prescription medication (opiates) may be incompatible*." It was recommended that he continue with a commitment to ongoing rehabilitation on his return to Sydney. It was also recommended that he must make a commitment to attend three to four Narcotics Anonymous meetings per week in addition to weekly individual counselling sessions in a rehabilitation outpatients' program.

75. Notwithstanding the absence of any subsequent evidence of attendance at either outpatient rehabilitation or Narcotics Anonymous meetings, Mrs Wahab said that after the rehabilitation program in Thailand the offender was much better. She described him as follows:

"He was a different person. More like the person I knew. He was more switched on, aware of his surroundings and wasn't so robotic. His memory had come to normal."

76. The balance of that part of Mrs Wahab's affidavit was consistent with the case conducted by the offender at trial, namely that Jacob Youssef had full control of the business being the Pharmacy Depot Hurstville. Mrs Wahab advanced a number of opinions and descriptions of different circumstances to support the proposition, as she expressed it, "*that Jacob had full control of the business and Hamza.*"

77. I note that this topic and the expressions of opinion by Mrs Wahab were not objected to, nor was the topic explored in cross-examination. However, to the extent that such expression of opinion might be sought to have some effect on the relevant findings of fact, consistent with the jury's verdict, for the purposes of sentence, I should make it clear that I do not accept such assertions.

78. Mrs Wahab's affidavit next deals with the effect upon the family and herself as a consequence of the proceedings. In dealing with the evidence advanced by Mrs Wahab in this respect, I should note that the provisions of s 16A(2)(p) requires a sentencing court to take into account "*the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.*" I should also observe that longstanding authorities both in the NSW Court of Criminal Appeal and intermediate appellate courts of other states which had held that "exceptional hardship" was required to be established in order to take such factors into account have now been held to be "plainly wrong" and ought not to be followed.

79. Such expression of principle was set out by the Chief Justice in ***Totaan v R*** [2022] NSWCCA 75, a decision of 11 April 2022. Bell CJ set out the reasons for that conclusion at [77]-[93]. Each of the other members of the bench of five, Gleeson JA, Harrison, Adamson, and Dhanji JJ agreed with the Chief Justice.

80. The first particular effect of the proceedings described in detail by Mrs Wahab was her attribution of three miscarriages from about June 2015 to depression and anxiety following media reports and the reaction of other persons to the police search.

81. She next described the difficulties in obtaining employment by the offender following him being charged in 2018 and mid-2020 during which time she said he was unable to obtain employment. She described him being able to obtain employment in June 2020 "*through a family friend*." In cross-examination on her affidavit, Mrs Wahab indicated that the employment at a pharmacy in Hornsby was only for a period of a few months.

82. In her affidavit, she describes the difficulties which arose with banks which did not want their business following the offender being charged. Mrs Wahab described the offender's accounts being closed by Bank West, Citibank closing her credit card, and the Commonwealth Bank closing her 7-year-old son's account. Documents with respect to those closures were annexed to her affidavit. The Bank West closure was dated April 2018 and would appear to indicate Mr Zoghbi's Master Card having an outstanding balance in excess of $4000 and being closed by the bank shortly after the AFP raid of the pharmacy and search of his premises. The closure of Mrs Wahab's Citibank credit card occurred in February 2019 and a letter confirming that closure and annexed to the affidavit was dated January 2022.

83. A letter of August 2021 closing an account held by the 7-year-old elder son of the offender would appear to have occurred some months after his father's conviction. It is unclear what connection there is between an account held by a child which was likely to have been a savings account and his father's conviction.

84. Mrs Wahab also makes reference to numerous loan applications being rejected. No correspondence confirming that assertion has been produced.

85. In further describing the effect of her husband having gone into custody following his conviction, Mrs Wahab describes the effect on her children. She described their elder son as having had a demonstrable change in his personality. She said he was very quiet and very good before his father went into custody. She described that he now rants all the time, screams all the time, and breaks down and cries because his father is not around. She said that these circumstances make her own depression worse and that a doctor had recommended that their son be taken to a child psychologist.

86. She described her elder son getting bullied at school after his father went into custody. She said that the child of another inmate at Silverwater had told other children at school that their son's father was in prison. She said that he had been bullied since that disclosure and that he came home one day with a black eye. A photograph depicting that injury was annexed to her affidavit. Mrs Wahab also said that she has consequently had to change the child's school.

87. Mrs Wahab said that at the beginning of November 2021, a note perceived as a death threat was found in her son's school bag. The note was said to be from a child whose father is also in Silverwater prison.

88. A photograph of the note which is handwritten on a small torn-off piece of paper appears to have been deliberately written in a pictorially misleading fashion. It would appear to be intended to read "*You are dead. I'm coming for you and I'm going to find you.*" So as not to require an examination of the image of the note, it was actually written in the following fashion:

"You are dead

For you

Find you I'm coming

And I'm going to"

89. It is unclear whether the child of someone in Silverwater is the same child referred to as having told others about the offender's incarceration nor whether the school is the same school from which the child has now been removed. It is also unclear how the note was identified as having come from a child whose father was in Silverwater or whether or not the receipt of the note was ever reported to the school or the authorities.

90. Mrs Wahab also sets out the detail of limitations on her ability to personally visit her husband due to COVID lockdowns between July 2021 and December 2021. The affidavit was affirmed on 28 January 2022 and has not been updated. However, the court is well aware of continuing difficulties in personal visits which have continued into 2022. It would appear that she was able to visit the offender some five times between the time he was incarcerated in April 2021 and the lockdowns commencing in July 2021. She was again able to resume visits in December 2021, although the court is aware of subsequent lockdowns during outbreaks of COVID-19 within correctional institutions.

91. Mrs Wahab also sets out the detail of her limited access to audiovisual communications with the offender and annexed to her affidavit is a copy of the email cancellations of planned personal visits and also video calls.

92. With respect to the financial impact upon the family, she described it as "*financially crippling*." Mrs Wahab deposes that she has had to borrow money from her mother for daily expenses and bills. She maintains the claim (made in evidence during the trial of the offender) that the $750,000 in cash seized by Australian Federal Police during the search of the family home had originally come from an inheritance from her father.

93. Mrs Wahab asserts that the family will continue to struggle financially as a consequence of the offender no longer being able to be employed as a pharmacist.

94. She described the difficulties of being a single mother with two young children in circumstances where the offender had been a very "hands on" father with considerable involvement in transporting the children to activities.

95. Mrs Wahab also sets out the detail of her own depression and the necessity to take antidepressant medication.

96. Her affidavit concluded with an assertion that she and the offender would not be contesting the forfeiture of any property associated with Pharmacy Depot Hurstville. She described the property so attained as being "*haram*" and hence unclean according to their Islamic faith. She stated that they had moved from the house at San Souci because they could not stay at a home purchased from potentially ill-gotten gains.

97. In the course of cross-examination by Senior Counsel for the Crown, Mr Maguire SC, she agreed that she and the offender had been married for more than 11 years. She also agreed that they had been known to one another as children because their families were friendly. She agreed that the offender had never had an actual asthma attack during that period of more than 11 years.

98. With respect to her husband's misuse of prescription drugs, she said that she was aware of him misusing prescription drugs while he was still a pharmacy student. In addition to Endone, she was aware of him misusing Valium and Xanax and similar drugs. She said that she believed they may have been purchased on the streets. She agreed whatever the supply chain was that it involved some degree of dishonesty on the offender's part.

99. With respect to his completion of the rehabilitation program in Thailand, she agreed that she was aware that he had been recommended to continue treatment in Sydney upon his return. She agreed that he did not do that and she was unaware of him engaging in any counselling following his return from Thailand.

100. With respect to the period during which the fraudulent funds were obtained from the Commonwealth, Mrs Wahab said he was definitely using drugs throughout that period. She said that she was unaware as to whether he was obtaining the Schedule 8 drugs from his own pharmacy.

101. With respect to the claim in her affidavit that her level of depression had been a cause of her miscarriages, she agreed that she and her husband both suffered from a genetic mutation (methylenetetrahydrofolate reductase, or MTHFR), one of the side effects of which is that it could cause miscarriages in a pregnant female and infertility issues in a male.

102. She agreed that she and the children had been involved from time to time in audiovisual communications with the offender in custody.

103. With respect to civil proceedings pursuant to Proceeds of Crime legislation, she agreed that they had not been finally resolved. She disagreed that various orders in those proceedings had been consented to by her and the offender despite being shown copies of consent orders, but did agree that particular orders had been made over the last several years about particular pieces of property.

104. She was asked about the luxury items, being watches, clothes, designer bags, etc, which had not been seized by the Australian Federal Police. She said that she did not believe that any such items had been forfeited. When asked about the seized cash i.e. the $750,000, she said that she would need to discuss the situation of it with her lawyers and that there were not currently any consent orders relating to it of which she was aware.

105. She was shown a Notice of Motion which had been filed on behalf of her and the offender seeking that the $732,000 (approximately) which had been seized be returned to Mrs Wahab. The document shown by the

Crown indicated that the Notice of Motion was dismissed. Mrs Wahab claimed that she did not know anything about it.

106. In re-examination, Mrs Wahab said that the limited access during the COVID shutdown period had changed and that they now had video calls for 30 minutes once a week.

107. A forensic psychiatric report from Dr Antony Henderson dated 4 October 2021 was tendered on behalf of the offender. Dr Henderson was also called for cross-examination.

108. The assessment which was conducted for the purpose of preparing the report occurred via audiovisual link for a period between one and a half and two hours. The history provided by the offender was that he lived in a rented family home in Yagoona with his wife and two sons aged 7 and 3. The report indicates "*he was employed full-time as a barber and reportedly attended a mosque on a daily basis, which he reports assisted with his drug abstinence*."

109. The account provided of the index offence and set out in the report is effectively a recitation of the evidence given by the offender at his trial. Dr Henderson reported that the offender strongly denied participating in the alteration of scripts or the fraudulent submission of claims and attributed these actions to Jacob Youssef. He maintained his assertions at trial that he had believed the income and funds which went into the joint account had been derived from legitimate sales. The psychiatrist further reported that Mr Zoghbi intended to appeal the finding of guilt and the severity of sentence (which of course has not yet been passed).

110. The report from Dr Henderson recounted responses by the offender to questions related to his mental health around the time of the offending behaviour.

111. Dr Henderson recorded that the offender described having experienced recurrent depressive episodes from his mid-20s throughout most of his adult life. The depressive episodes would last around 3 to 4 days and were associated with family stress. The offender made specific reference to his own father's bankruptcy and to his wife suffering the genetic mutation MTHFR.

112. The offender also described a number of mood-elevated or 'manic' symptoms which would occur episodically involving *inter alia* increased confidence and extroversion with impulsive, socially indiscreet and flirtatious behaviour, which would last for somewhere between a number of hours and a day.

113. Dr Henderson recorded a description by the offender of an incident in Beirut during a family holiday in Lebanon when he was around 9 years of age. The offender described having been caught in cross-fire whilst attending a shop with his cousin and having witnessed a man being shot in the head. The offender described having been kidnapped and questioned with respect to what he had seen. He also described a later occasion of being in Beirut when he was 13 and needing to seek refuge in a bunker on account of Israeli bombing.

114. The offender described regularly experiencing intrusive recollections or flashbacks of these childhood incidents.

115. The offender recounted having developed a significant drug use problem. He described self-medicating with Oxycodone from his mid-20s and having increased to 1-2 packets per day after commencing his own pharmacy practice. The offender also described using benzodiazepine and taking 1-2 tablets of Xanax or Valium daily as well as a stimulant, methylphenidate. The offender said that he was using these medications to self-medicate his depression.

116. The offender also described the rehabilitation program which he had attended in Thailand and described having relapsed after his return to Australia. He claimed to have established 12 months of drug abstinence before entering custody without specific treatment.

117. The offender reported that since entering custody, his mood had significantly deteriorated. He said he now felt frightened and intimidated. He said his mood is pervasively low and that he had experienced weight loss, low self-esteem and a sense of hopelessness.

118. Dr Henderson noted that the offender had not been assessed or treated by a psychologist or psychiatrist since entering custody. He also noted that notwithstanding the prior history of the trauma-related symptoms related to exposure to violence as a child and the ongoing depression and episodic hypomania, the offender had not previously been reviewed by a psychiatrist or psychologist before going into custody.

119. Dr Henderson's report described the offender's background in fairly brief terms. He had been born in Sydney and grew up in Guildford as the eldest of three children. His father was described as a "*beautiful man*" who ran his own business as a tobacconist. His mother was described as "*tough*" and "*unaffectionate*". He said that he was bullied at Primary School because of his cultural background but in due course attended Sefton and Bankstown Grammar High School where he acquired above average grades and completed Year 12 before moving to a Medical Science degree at the University of Western Sydney and a Master of Pharmacy in Canberra.

120. The offender had married at the age of about 27 in 2010.

121. No formal mental state examination was conducted in relation to the interview. The psychiatrist noted that the offender reported his mood as 'stressed' and 'depressed'. He was not, however, overtly distressed or agitated in the interview.

122. An interview was conducted with the offender's wife, Mrs Wahab, by telephone. She confirmed a significant drug use history and described her perception of the offender's mental health deterioration whilst in custody.

123. The psychiatrist carried out a risk assessment utilising the Level of Service Inventory – Revised (LSI – R). A combination of identified mental disorders together with the offender's drug use and history of mental illness (as described by the psychiatrist) were identified as factors associated with an increased risk of offending behaviour. However, based on the assessment which was carried out Dr Henderson was of the view that if the offender engaged in comprehensive treatment of his various mental conditions he would be at a low risk of engaging in further offending behaviour.

124. On the basis of an acceptance of the truth and accuracy of the distressing and life-threatening traumatic events which were said to have occurred in Beirut, Lebanon involving shooting, kidnapping and bombings, Dr Henderson made a diagnosis of Post-traumatic Stress Disorder (PTSD).

125. On the basis of an acceptance of the account by the offender that he had experienced recurrent episodes of pervasive low mood state with inability to experience pleasure, reduced appetite, withdrawal, disturbed sleep and ambivalence about his future, the psychiatrist made a diagnosis of a Major Depressive Disorder.

126. The third psychiatric diagnosis by Dr Henderson was of Benzodiazepine, Stimulant, and Opioid Use Disorder, again on the basis of an acceptance of the account provided by the offender and to some degree corroborated by his wife.

127. A differential diagnosis of Bipolar II Disorder was made on the basis of mood-elevated episodes which were described. This diagnosis was differential only and not definitive. It was contrary to what was described by the offender on the screening questionnaire upon his reception into custody.

128. The ultimate opinion of the consultant psychiatrist was that Mr Zogbhi was a vulnerable individual on account of his exposure to developmental trauma and had consequently developed symptoms consistent with the diagnosis of Post-Traumatic Stress Disorder. Dr Henderson made reference to research which had consistently demonstrated a link between PTSD and offending behaviour, particularly associated with behavioural dysregulation, impulsivity, engagement in risk-taking and antisocial behaviour.

129. Dr Henderson expressed the opinion that the psychiatric diagnoses which he had identified may have contributed to impulsivity in the offender, reduced his ability to consider the consequences of his actions, compromised his judgement and, consequently, contributed to the offending behaviour.

130. His ultimate conclusion (at [12.6]) was as follows:

"Given the relationship between Mr Zoghbi's mental illness and conditions and the offending behaviour, the impact custody is having on his mental state and the additional burden custody represents on account of vulnerabilities, the limited treatments available to him in custody and low assessed risk of further offending behaviour, I respectfully request the Courts to consider Mr Zogbhi appropriate for a non-custodial disposition."

131. I should clearly note that I do not propose to accede to that respectful request as to an appropriate disposition of the matter.

132. Dr Henderson was cross-examined by Senior Counsel for the Crown. Dr Henderson agreed that the necessity to conduct the consultation via audiovisual link was less satisfactory than a face-to-face consultation. He agreed that he did not conduct any tests for malingering or exaggeration.

133. He agreed that the opinions which he had expressed were based upon an acceptance of the truthfulness of the accounts given to him by the offender regarding past symptoms. Dr Henderson adhered to his view that his ability to reach a conclusion about a diagnosis based upon the AVL consultation was, in effect, superior to reliance on the statements by the offender in the Justice Health documents which had been completed on his admission into custody and the mental health screening test which had been undertaken at that time.

134. Dr Henderson agreed, however, that there was nothing to indicate that the offender was unaware of the wrongfulness of the actions described in cross- examination which constituted relevant aspects of the execution of the fraud.

135. It became clear in the course of cross-examination that in a number of particular areas regarding his activities, the offender had not been truthful in the account which he provided to the psychiatrist.

136. Dr Henderson was called upon to express opinions regarding the offender's participation in the crime charged and the prospect of future offending, in circumstances where the offender categorically denied any wrongdoing and any intentional participation in the commission of the crime. The offender failed to reveal the nature of the false entries regarding the reasons for the disposition of the fraudulently obtained funds in the joint account and, effectively, maintained the same account which he had given at his trial and which was clearly rejected by the jury.

137. I accept that the offender's past history of drug abuse and his evinced desire to materially look after his family and his role in the "*family success story*" are factors which provide some relevant explanation for his participation in the conspiracy. However, in my view, they do not reduce his moral culpability.

138. The third item in the Defence tender bundle was a report from Dr Richard Wu, consultant psychiatrist, dated 17 October 2021. This report related to mental health treatment provided to the offender's wife, Mrs Naima Wahab. She had been referred for treatment by her general practitioner to the consultant psychiatrist Dr Wu. She had seen Dr Wu on six occasions in the period of almost 10 months between December 2020 and September 2021.

139. Mrs Wahab reported a history of pre-existing generalised anxiety disorder which she had suffered since her childhood. She said this was characterised by excessive worrying, panic attacks, and low confidence. However, she had developed an onset of major depressive symptoms and an exacerbation of her anxiety disorder which she related to the commencement of the investigations into her husband some six years earlier. Her depressive symptoms were reported as having further worsened since her husband had been sentenced. I interpret that as being a reference to the time following the jury's verdict of guilty.

140. Dr Wu had prescribed a variety of antidepressant medications as well as a sedative at night. He also commenced a program of Cognitive Behavioural Therapy with an emphasis on anxiety management. Dr Wu was of the opinion that Mrs Wahab's symptoms had been made more difficult with being a single parent under Covid – 19 restrictions and having to homeschool her children who were 7 and 3 years of age.

141. Dr Wu was of the opinion that her anxiety and depressive disorders were likely to become chronic and impact on her sons' well-being and development if her husband was sentenced to a term of full-time imprisonment.

142. I will take Mrs Wahab's affidavit and Dr Wu's report into account in considering the effect of the offender's incarceration upon the family.

143. A character reference from Mohamed Charchouh, Community Centre Manager of the group United Muslims of Australia (item 4 in the Defence tender bundle) indicates that he had known the offender for eight years. During that time the offender had attended the Youth Centre of which Mr Charchouh was the manager and had volunteered with programs such as "Youth off the Streets" and mentoring programs.

144. Mr Charchouh was of the opinion that the offender was a very respectable, kind and helpful person and expressed his shock at the charges which had been brought. He expressed confidence that the offender would come out of the experience as "*a better person*".

145. The letter from the Islamic Chaplain at the MRRC, Mouhamed Sari, (item 5 in the Defence tender bundle) describe the offender during the period of six months in which the Imam had observed him, as being a welcoming, helpful and positive role model for other inmates as well as assisting custodial officers and inmates with multiple jobs "*beyond his call*". The Chaplain described having had many discussions with the offender regarding "*his charges*". The content of those discussions is not revealed.

146. This letter and reference dealing with positive perceptions of the offender's character and behaviour in the community both before and since entering custody, will be considered by me when dealing with subjective characteristics set out in section 16A of the Crimes Act 1914 (Cth).

147. Also tendered in the Defence Tender Bundle were a series of documents produced under subpoena by the Australian Federal Police. These documents illustrate some aspects of the proceeds of crime proceedings which have been initiated in the Supreme Court of NSW against the conspirators, namely Youssef and Zoghbi, against the Pharmacy Depot Hurstville, and against interests held by members of their families. To the extent that the defence seeks to rely upon this material as evidence of the likely return to the Commonwealth of defrauded funds, it is, as I discuss later, subject to the provisions of s 320 of the *Proceeds of Crime Act 2002* (Cth).

COMPARATIVE CASES

148. The Crown provided the court with a Schedule of Cases, together with full copies of each of those decisions. Whilst recognising that individual sentences turn on the particular circumstances of each case, such schedules and decisions are of considerable utility both in illustrating the appropriate range for similar offending and in the attainment of consistency in sentencing for Commonwealth matters in different States. The tendered schedule is divided according to the position of the respective offenders as either a medical practitioner, an employee of medical practices, or an employee of Medicare. Some of the cases relate to defrauding the Commonwealth with respect to tax frauds. I propose to refer to those cases in the chronological sequence in which they were decided.

149. In ***Quetcher v R*** [2010] NSWCCA 257, the offender was the Branch Manager of the Shellharbour office of Medicare. She had been the Branch Manager at the Shellharbour branch since 1988. An audit investigation in 2007 revealed that during a period of approximately 5 years, the offender had created 65 false identities

as members of Medicare and had processed some 387 fraudulent claims for medical benefits in those false names. The total amount paid was in excess of $156,000.

150. The offender was arraigned on an indictment containing 65 counts of dishonestly obtaining a financial advantage by deception contrary to the provisions of s 134.1(1) of the Criminal Code (Cth). She pleaded not guilty. Following an 11-day trial before a jury of 12, she was found guilty of each count.

151. The offending conduct had taken place during the 5 years between approximately June 2002 and February 2007. None of the funds were repaid. She was sentenced in December 2009 to terms of imprisonment of 3 years with respect to each of the offences. The sentencing judge, Solomon DCJ, partially accumulated groups of the sentences leading to a total aggregate sentence of 8 years with a non-parole period of 5 years.

152. The sentencing judge found that the offender had abused the trust which had been reposed in her by her employer. He found that each of the offences were objectively extremely serious having regard to the fact that they were premeditated and deliberate. He regarded each offence as being "*well above the mid-range of objective seriousness*." His Honour noted that none of the money had been repaid and the only view that one could come to regarding motive was that the money had been taken for her own purposes. The family was reasonably well off. The family owned their home and also had an investment property. The offender was not involved in gambling and had no issues involving alcohol or other drugs.

153. In rejecting the appeal against severity of sentence, Price J (with whom McClellan CJ at CL and Latham J agreed) said (at [36]):

"…the applicant's offending included the creation and use of 65 false identities, false invoices, dishonest handwritten notations, and some 387 fraudulent transactions. This was a persistent and sagacious fraud committed over a period of 4 years and 8 months. The abuse of trust, the sophistication and planning, the difficulties of detection and the significant period over which the frauds were committed all add to the gravity of the offences."

154. The challenge to severity had acknowledged that the amount of money dishonestly obtained is undoubtedly a significant matter in assessing the objective seriousness of the offences. The amount of the fraud in that matter, namely $156,034.50 was less than the amounts involved in a number of what were said to be comparative cases. However, the court was of the view that the other factors when considered in combination justified an assessment that the criminality involved was of a high order, notwithstanding the lesser amount of money obtained.

155. The appeal was accordingly dismissed.

156. In ***El Rakhawy v R*** [2011] WASCA 209, a 52-year-old medical practitioner pleaded guilty to 11 counts of dishonestly obtaining a gain from Medicare, contrary to the provisions of s 135.1 of the Criminal Code (Cth). The maximum penalty was 10 years' imprisonment and the effective sentence which was passed was 4 years' imprisonment with a single non-parole period of 2 years 4 months.

157. Over a period of approximately 2 years 4 months between April 2007 and August 2009, the offender made claims for payment to Medicare for services which he represented had been provided to patients. The offender had made additional claims relating to alleged bulk billing for services which had not been provided to the patient. Each of the 11 counts related to a number of separate false claims within an identified period. Within each of those false claims, there were numerous false items which had been fraudulently claimed.

158. The offender had pleaded guilty at the first available opportunity and had repaid the total amount defrauded, namely $121,599.90. At the time of sentence, he was bankrupt and unemployed. At the time of sentence, the maximum penalty for an offence of carrying out an act with the intention of dishonestly obtaining a gain from a Commonwealth entity, contrary to s 135.1(1) of the Criminal Code (Cth), was imprisonment for 5 years. I am constrained to observe in passing that the fact that there was a lesser

maximum penalty available with respect to Dr El Rakhway is a significant fact which does not appear to have made its way into the commentary in the schedule which has been provided. The individual charges related to total amounts defrauded which ranged from approximately $327.00 (Count 3) up to $41,460.85 (Count 6).

159. The number of false items within the various false claims similarly ranged from as little as 6 false items (Count 3) and up to 640 false items (Count 6). Similarly the variation in the number of false claims ranged from as little as 3 (Counts 3 and 7) up to 35 false claims (Count 11). The judge at first instance imposed sentences of 2 years with respect to each of the 11 counts. He accumulated the 2 years imposed for Count 2 with the 2 years for Count 1 and directed that the remaining 9 sentences of 2 years each were to be served concurrently with each other and with Count 1. As already indicated, the effective sentence was 4 years with a 2 year 4 month non-parole period.

160. The offender appealed against the severity of the individual sentences and against the total effective sentence.

161. In due course, the Western Australian Supreme Court reduced the aggregate sentence to one of 3 years and ordered the release of the appellant on a recognisance release order after serving 20 months imprisonment

162. In determining that the appeal against the overall sentence should be allowed, Hall J of the Western Australian Court of Appeal undertook a detailed review of some 13 cases which had involved false claims committed on Medicare. Those cases involved fraudulent claims by medical practitioners as well as internal frauds committed by Medicare employees. The related to different maximum penalties in some instances and to a wide range of different amounts which had been defrauded. They ranged from a total fraud of just over $1000 (***Canning v Northcott*** (unreported, WASC Library Number 7194, 14 July 1988)) up to an amount in excess of $560,000 (***Corbett v R*** (1991) 52 A Crim R 112).

163. In ***Canning v Northcott***, a medical practitioner had made 39 false claims for services to Medicare. Some related to services which had not been rendered whilst others claimed longer consultations than had actually occurred. A pecuniary penalty of $10,000 was imposed.

164. ***Corbett*** on the other hand related to 439 false claims for services which had not been provided. The offender was 34 years of age and was a medical practitioner running a practice which employed a number of other doctors. Psychiatric evidence indicated the offender suffering from serious depression following the breakdown of his marriage. He pleaded guilty to 92 charges broadly described as “medifraud”. 92 charges, described as representative, were brought with respect to various provisions of the Health Insurance Act 1973 (Cth). The offences carried a maximum term of imprisonment of 5 years. The sentencing judge, Judge Cooper of the NSW District Court, had imposed head sentences which ultimately involved an overall term of imprisonment for 8 years. His Honour fixed an aggregate minimum term of 6 years.

165. In ***Corbett*** the NSW Court of Criminal Appeal, Gleeson CJ, Priestley JA and Matthews J, upheld the appeal against severity and varied the effective orders to result in total head sentences of 7 years 6 months with a non-parole period of 4 years.

166. It is important to note that the fact of different sentencing regimes, including in ***Corbett*** the need to take into account pursuant to s 16G of the Commonwealth Crimes Act the absence of remissions in NSW at that time, leads to particular difficulty in utilising any numerical equivalents by way of comparison. However, whilst noting difficulties involved in relying too heavily upon previous sentencing patterns, the Court made the following observation with respect to dealing with white-collar crime as at 1991:

“Nevertheless, a feature of past sentencing for “white-collar” crimes involving fraudulent abuse of trust, and sometimes involving fraud on the public purse, has been the imposition of lengthy head sentences, but with a substantial gap between head sentence and non-parole periods or minimum terms. This has probably been the consequence of a desire on the part of the courts, on the one hand, to reflect the need for general deterrence and,

on the other hand, to give due account to the fact that the offenders involved frequently have no prior criminal history, are unlikely to re-offend, and have good prospects of rehabilitation."

167. Hall J made the observation that in some respects the case involving Dr El Rakhawy bore similarities to that of ***Corbett***. His Honour observed (at [66]):

"However, the offender in that case obtained a much larger sum of money, was convicted of many more offences and pleaded guilty at a very late stage. Those factors are reflected in the higher total sentence imposed in *Corbett*."

168. Hall J noted that the different offences occurred as part of a course of conduct. Taking that context into account, it was not possible to conclude that individual sentences of 2 years were in error. His Honour thought that the real question was whether the total effective sentence was appropriate. After giving consideration to the principle of totality, Hall J came to the view that the total effective sentence was particularly high when compared to a number of the more comparable cases. His Honour noted that systematic frauds committed by professionals such as doctors or lawyers and involving large sums of money were viewed as particularly serious. Hall J said: "*they are an abuse of the privilege and responsibility that a member of a profession has and they can impact adversely on the reputation of that profession as a whole*." However, his Honour concluded that: "*on the other hand, the fast-track plea of guilty, cooperation with authorities, and full restitution were significant mitigating factors*." The court accordingly came to the view that the total effective sentence of 4 years was disproportionate and that the total effective sentence should be reduced to one of 3 years. The court ordered that the offender be released on a recognisance release order after serving 20 months imprisonment. Accordingly, the head sentence was reduced by 12 months and the minimum term to be served by 8 months.

169. ***R v Cox; R v Cuffe; R v Morrison*** [2013] QCA 10 concerned a conspiracy to defraud the Commonwealth by promoting tax minimisation schemes for the 1999 and 2000 tax years. The scheme involved recruiting participating taxpayers who would purportedly enter into loan agreements in which they notionally borrowed thousands of dollars which were secured by life bonds or insurance policies. The funds were then purportedly invested in retirement village joint-ventures or in employee welfare funds, or paid by way of donation to a church building fund, so as to produce an immediate tax deduction.

170. The arrangements were a complete scam and the multifarious taxpayers' claims for deductions were ultimately disallowed and many of them were subject to penalty tax. The amount of income tax imperilled was $4.5 million but there was no actual loss to revenue.

171. The principal offender was Cox who was described by the sentencing judge as the *"controlling mind and driving force of the whole operation."* Cox had profited substantially and was found to have received the best part of $4.25 million. An appropriate notional starting point for the sentence was thought to be 8 years imprisonment, given that Cox was at that time already serving a sentence for State offences. The question of accumulation and possible circumstances which would require the Attorney-General's exercise of discretion to permit his release were taken into account in ultimately passing a sentence of nine years and 11 months which had the effect of subsuming the balance of the sentence for the State offences.

172. Mr Cuffe and Mr Morrison had different roles and conduct in the conspiracy. Cuffe had indirectly benefited by about $94,000 for his role in the schemes, whereas Morrison was working in the expectation of a large future reward. Notwithstanding these differences the two offenders were found to be appropriate to receive the same sentences as each other.

173. At first instance they were sentenced to 6 years imprisonment with a three-year non-parole period. The Queensland Court of Appeal held that the sentences of six years imprisonment would not have been open to challenge had it not been for the delay in prosecution and its implications. Interviews with respect to the schemes had been conducted by officers of the Australian Taxation Office in July 2000. Some premises had been searched the same year and Federal police had become involved in the investigation in April 2001. Warrants had been executed at the premises of Mr Cuffe and Mr Morrison in mid-2002, but

proceedings had not been commenced until some 5 ½ years later, in November 2007. The trial had then not taken place until 2011, some 11 years after the investigation had commenced.

174. Taking into account the inordinate delay, and despite not intervening in the sentence passed on Cox, the Court reduced the sentences for Cuffe and Morrison from 6 years with 3 years non-parole to 5 years imprisonment with non-parole periods of 2 and a half years.

175. In ***DPP v Golic*** [2014] VSCA 355, the offender pleaded guilty to a number of offences which had arisen as a consequence of her having made false claims to Medicare and also to her private health insurer with respect to obtaining reimbursement for medical expenses which she had not incurred. The background to the offending indicated that the offender had begun to suffer from a depressive illness when she was in Year 11 at school. She had been prescribed antidepressants since that time.

176. In 2006, when she was 23, she was diagnosed as having an inoperable brain tumour. She was advised that she might only live for a month, or for a year, or for 10 years. She was working as a bookkeeper at an accountancy firm and was introduced to gambling by her colleagues. She went on to develop a serious gambling addiction. By May 2007, she entered bankruptcy having declared significant debts.

177. In 2010, she was advised of the possibility of undertaking neurosurgery for her brain tumour notwithstanding that the surgery involved considerable risk. In 2011, she undertook the neurosurgery and made a complete recovery. However, following the operation, her gambling intensified and between March 2012 and May 2013, she committed the offences.

178. Although systematic and planned, the offending was relatively unsophisticated. The offender simply copied a genuine invoice relating to her earlier neurosurgery and used it as a template to create false invoices which she used to make her claims on Medicare and her private health insurer.

179. Ultimately, 34 false invoices were lodged with Medicare, at different Medicare offices, resulting in the fraudulent obtaining of rebates in an amount of approximately $200,000. This offending was charged as obtaining a financial advantage by deception contrary to s 134.2(1) of the Criminal Code (Cth).

180. Two further false invoices were lodged in an unsuccessful attempt to obtain further rebates for approximately $17,000. This was separately charged as an attempt to obtain a financial advantage by deception contrary to the same provision of the Criminal Code (Cth). The obtaining of almost $43,000 from the offender's private health insurer, Bupa Australia, resulted in a Victorian State Crimes Act offence of obtain a financial advantage by deception contrary to s 82(1) of the Crimes Act 1958 (VIC). Each of the three charges carried a maximum penalty of 10 years imprisonment.

181. The offender had begun receiving treatment for her depression from a psychiatrist following her neurosurgery in 2011 and prior to the commencement of the commission of the offences. She was also on the maximum dose of an antidepressant drug prior to her offending. A psychiatric report described the sense of hopelessness which the offender had felt following her original diagnosis which had fuelled impulsive and risk-taking behaviour. Despite the success of her neurosurgery, she remained uncertain and overwhelmed by the notion of surviving into her adult years. The psychiatrist expressed the opinion that her thoughts had operated in a manner "*which can only be described as diminished responsibility."* She had subsequently attended Gamblers Anonymous and had returned to university classes.

182. A separate consulting psychiatrist expressed the opinion that there was a strong association between the commencement of her gambling and the diagnosis of the brain tumour. He diagnosed pathological gambling and recurrent depressive disorder as set out in the International Classification of Diseases (10^{th} revision) (ICD-10).

183. The sentencing judge in the County Court of Victoria had concluded that the circumstances gave rise to "*an exceptional case*" which did not require the offender to serve any time in custody. Following her pleas of guilty to each of the offences, notwithstanding a maximum penalty of 10 years imprisonment for each,

she was sentenced to an immediate recognisance release order to be of good behaviour for two years for each of the Commonwealth offences and a two year Community Correction order with 80 hours of community work with respect to the state offence. The statement required under the relevant Victorian sentencing provisions, namely stating the sentence which would have been imposed if she had not pleaded guilty, was 3 years imprisonment with a non-parole period of 12 months. A Crown appeal against inadequacy was dismissed.

184. In ***R v Buckman*** [2016] QCA 176, the offender worked in an administrative position in a number of medical practices. She used the Medicare numbers of more than 500 patients of the medical practices at which she worked and fraudulently obtained approximately $189,000 in relation to false claims. The offending occurred over 16 months between May 2011 and November 2012.

185. She pleaded guilty to three counts of obtaining a financial advantage by deception contrary to s 134.2(1) of the Criminal Code (Cth). The offender was 36 years of age and the offending arose out of difficulties in her life associated with drug use and the development of a significant gambling addiction which remained hidden from her family. She had sought and received counselling and made significant attempts at rehabilitation before being sentenced and subsequently. There had been a delay of between approximately 3 and 5 years between the offending and being sentenced.

186. At the time of sentence for these matters in January 2016, the offender was already serving a sentence of 2 and a half years imprisonment with a parole release date of 8 months which had been imposed in June 2015. That sentence related to state charges of dishonesty (stealing as a servant) where she had stolen some $35,000 whilst employed as a receptionist in a medical practice. The offending had occurred in 2013.

187. The offender also had a previous conviction from 2006 where she had been placed on a recognisance to be of good behaviour and make reparation of $4000 with respect to false claims made on Medicare with a previous medical practice.

188. With respect to the Criminal Code offences, an effective head sentence of 3 years was imposed. The sentencing judge considered that 3 years was "*a little light*" but was prepared to impose that sentence because of the offender's good conduct in prison and an intention that her release date should be set at about 21 months after the commencement of the pre-existing sentence and close to the mid-point of the total period of incarceration, including the sentence already being served, of 3 years 7 months. Accordingly, the sentencing judge fixed a non-parole period of 14 months and ordered reparation to the Commonwealth in the sum of $189,316 whilst noting that there was no current prospect of that amount being recovered.

189. The Queensland Court of Appeal (per Fraser JA; Gotterson and Philip McMurdo JJA agreeing) contrasted the situation with that in *El Rakhawy v R* and expressed the view that the guidance supplied by that case indicated that a more severe sentence than 3 years imprisonment could have been imposed for the Commonwealth offences. This was particularly so given the greater maximum penalty which was applicable and the circumstance that the offending by Ms Buckman was significantly more serious, particularly because the amount defrauded was much larger, she was not in a position to make any restitution, and she had a relevant criminal history.

190. The application for leave to appeal against sentence was refused.

191. In ***DPP (Cth) v Phan*** [2016] VSCA 170, a medical practitioner dishonestly obtained $854,188.20 from Medicare over a period of almost 7 years. The fraudulent claims related to the provision of medical service which, in fact, had not been provided. Two rolled up charges under s 134.1(1) of the Criminal Code (Cth) related to separate groups of claims. The maximum penalty was 10 years imprisonment (and/or a monetary penalty). The first group of claims related to 3,357 false claims for services not rendered between December 2006 and May 2012. The fraudulently obtained sum with respect to that period was in excess of $211,000. A second period of less than 12 months related to a very substantial increase in the number of

fraudulent claims made. 11,208 false claims were submitted between October 2012 and September 2013 resulting in a fraudulent payment of $642,763.10.

192. The claims were not lodged individually but in batches whereby electronic bulk bill claims were made by means of computer transmissions. The offender obtained details of additional family members of an actual patient from the Medicare card which they would submit and would select a name at random from the other members of the family in respect of whom he would claim a fee for a service which had not been rendered in respect of that person.

193. A search warrant had been executed by Medicare investigators at the home of the offender in September 2013. He subsequently made full admissions in the course of a recorded interview in November 2013. He was subsequently charged in October 2014 and pleaded guilty at a committal hearing in November 2014. The plea hearing took place in the County Court of Victoria in October 2015 and he was sentenced by the County Court judge, Judge Cotterell, in November 2015.

194. The offender was 41 years of age at the time of sentence having come to Australia from Vietnam as a refugee in 1978. He had graduated in Medicine in 1998 and had subsequently been married twice. The divorce from his first wife had left him under considerable financial pressure.

195. He subsequently had a failed importing business which had also left him with substantial debt.

196. In the County Court, the offender was sentenced to an aggregate term of 3 years imprisonment with respect to both charges. A recognisance release order was made for the offender to be released after 16 months.

197. A Crown appeal against the inadequacy of sentence succeeded. Ashley JA, with whom Tate and Santamaria JJA agreed, imposed an aggregate sentence of 4 years' imprisonment with a 2 year non-parole period. The court also made a declaration under s 6AAA of the Victorian Sentencing Act 1991 that, had the respondent not pleaded guilty, a sentence of 6 years imprisonment with a 3 years 9 months non-parole period would have been imposed.

198. ***Dickson v R*** [2016] NSWCCA 105 and ***Issakidis v R*** [2019] NSWCCA 302 were both appeals in relation to the conviction and sentences imposed on co-conspirators with respect to a substantial defrauding of the Commonwealth arising from a complicated tax scheme. In particularly abbreviated summary, the agreement between the co-conspirators was that a company of which they were the directors would falsely claim that it had incurred financial payments for the acquisition of particular medical technologies where no such obligations or expenditures had in fact been incurred. The consequence of this agreement was that the claimed expenditure was offset against taxable income, hence substantially reducing or completely offsetting tax which would otherwise have been payable.

199. Each of the co-conspirators was ultimately convicted, following separate trials, of one count of conspiracy to dishonestly cause a loss to the Commonwealth contrary to s 135.4(5) of the *Criminal Code* (Cth) (Count 1) and one count of conspiring to deal with property of a value of more than $1 million, believing it to be the proceeds of crime (Count 2).

200. Count 1 was described as involving a complex 'tax fraud' with net losses to the Commonwealth in excess of $100 million, whilst count 2 related to a money-laundering offence wherein large sums of money were sent across the globe disguised as financial transactions, with funds later returned to Australia.

201. The various proceedings against each of the co-conspirators had a somewhat tortuous history. They had been arrested and charged in early 2012. A joint trial commenced in the Supreme Court of New South Wales before Beech-Jones J and a jury in early August 2014. After approximately four and half months an application was made and granted that the jury be discharged with respect to the trial against Issakidis. However, Dickson did not join in the application for a discharge and his trial continued. On 22 December 2014 the jury returned a verdict of guilty with respect to the two counts which I have described earlier.

202. Dickson was an accountant and a former principal at Ernst & Young. The sentencing judge at first instance described the loss to the Commonwealth pursuant to the conspiracy as a "*temporary*" net loss of $100 million. Beech- Jones J described the conspiracy in the following terms: *"Having regard to its size, scale, timespan and tactics his offending falls into the worst category of cases under s 135.4(5)."* (See ***R v Anthony James Dickson (No 18)*** [2015] NSWSC 268 at [135].)

203. Against a maximum penalty of 10 years Dickson was sentenced to 7 years and six months with respect to the conspiracy to defraud under s 135.4(5). With respect to the money-laundering offence which carried a maximum penalty of 25 years, his Honour found that it represented *"a very serious example of this offence"* and passed a sentence of nine years imprisonment.

204. Partial accumulation resulted in an overall term of 11 years with a non-parole period of seven years.

205. An appeal by Dickson against his conviction was rejected. However, a Crown appeal against the manifest inadequacy of the sentences imposed was upheld.

206. In relation to the conspiracy to defraud the Commonwealth, the New South Wales Court of Criminal Appeal, per Schmidt and Wilson JJ (Macfarlan JA agreeing) held that the offence was concerned not only with losses, but also risks of losses (***Issakidis v R*** [2019] NSWCCA 302 at [159]). The conspiracy had been continuing at the time of the appellant's arrest and hence had not been fully implemented. The sentencing judge's finding that there had been a temporary delay in obtaining a tax debt in excess of $100 million and that the intended extent of the loss or risk of loss was up to $135 million, was found to contain no error.

207. The Court of Criminal Appeal agreed with Beech-Jones J's unchallenged conclusion that the offence fell under the worst category of cases under s 135.4(5): *"given the nature of the appellant's offending; its scale; the sophistication and planning involved; the way in which and time over which it was pursued and implemented; and the appellant's role in this conspiracy, which depended on his detailed knowledge of the tax system."* (at [167])

208. In the event, the Court of Criminal Appeal concluded that, as a case falling into the *"worst category of such offending*", a sentence at, or close to, the maximum penalty should have been imposed on the offender.

209. The court made reference, as had the sentencing judge, to ***R v Dunn (No 9)*** [2014] WASC 61 in which Dunn had been the principal in devising and implementing a scheme to offset tax payable by claiming false tax deductions in which the purpose of inflicting a loss of $7.2 million was not achieved because the conspiracy had been detected. Dunn had similarly been charged under s 135.4(5) with a maximum of 10 years and had been sentenced to 7 years with a non-parole period of 4 years. Dickson compared unfavourably to Dunn, but it only received an additional six months with respect to the sentence which was passed.

210. The Court also referred to ***El-Chaar v R*** [2007] NSWCCA 16 which involved a premeditated tax fraud involving false claims for GST refunds committed over a period of approximately 11 months. The ongoing fraud was charged as 13 substantive offences of dishonestly obtaining property by deception and one offence of attempting to obtain property by deception contrary to the relevant provisions of the Commonwealth Criminal Code. The total amount involved in the dishonestly obtaining offences was in excess of $1 million, whilst the amount involved in the attempt offence was $62,500. The maximum penalty for each offence was 10 years imprisonment and the total sentence imposed, after entry of a guilty plea, was eight years with a non-parole period five years. The appeal against the severity of that sentence was dismissed.

211. The Court of Criminal Appeal also made specific reference to ***O'Meara v R*** [2009] NSWCCA 90, which had concerned a sentence for one count of obtaining a financial advantage by deception and four counts of attempting to obtain a financial advantage by deception following conviction after a jury trial. The

maximum penalties in that case were also 10 years. An appeal from the overall sentence of eight years imprisonment, with a non-parole period of five years and four months, was dismissed.

212. The various crimes charged in that matter involved the provision of false information concerning alleged purchases which were claimed to have incurred GST hence giving rise to an entitlement to a refund of what had been paid, but which, of course, had in fact not been paid.

213. Following their consideration of these comparative sentences, the need for a "*significant sentence*", and the absence of subjective circumstances which might have warranted significant mitigation of the penalty imposed upon him, the Court of Criminal Appeal concluded that the sentence imposed on Dickson of seven years and six months with respect to the conspiracy to defraud the Commonwealth pursuant to s 135.4(5) was manifestly inadequate. The Court resentenced him to a term of imprisonment of nine years.

214. The Court also found that the sentence of nine years imprisonment with respect to the money-laundering offence was similarly manifestly inadequate. Dickson was resentenced to a term of 12 years with respect to this offence.

215. The overall sentence was accordingly increased from 11 years with a seven year non-parole period, to 14 years with 9 years and 3 months non-parole. That sentence was passed in the Court of Criminal Appeal in June 2016.

216. Following the discharge of the jury with respect to Dickson's then co-accused Issakidis at the joint trial in 2014, Issakidis eventually stood trial to completion in 2017. His retrial was conducted in a similar fashion to the present matter involving Mr Zoghbi. Issakidis gave evidence that the fraud, which had undoubtedly been committed, had been carried out exclusively by his co-director Mr Dickson. Issakidis, who was a former solicitor, claimed to have had no knowledge of Dickson's fraudulent activities. His counsel had addressed the jury in the following terms:

"Now let me be crystal clear on what the defence position is in relation to Anthony Dickson. He is a liar. He is a deceiver. He has, you would conclude, committed very serious criminal offences against the Commonwealth of Australia and in all likelihood the Internal Revenue Department of New Zealand. But just because Anthony Dickson is a liar, a deceiver, and a criminal, do not presume Michael Issakidis is.

...

If Anthony Dickson was in the witness box right now and told you the sun was up, I would think you would all look outside., He is pathologically dishonest and he is a deceiver, and this is where you use your common sense, and when you assess the evidence Michael Issakidis gives, and he gives evidence that he was deceived…"

217. The retrial was conducted before Harrison J and the jury returned verdicts of guilty with respect to Mr Issakidis in June 2017. With respect to the same two counts for which his co-conspirator Dickson had been sentenced, and after the imposition of the increased sentences in the Court of Criminal Appeal regarding Dickson, Issakidis, whose role was accepted as somewhat lesser than Dickson, was sentenced to 7 years imprisonment for the conspiracy to defraud the Commonwealth and 8 years and 3 months with respect to the conspiracy to deal with the proceeds of crime, described as the money-laundering offence.

218. An appeal against conviction was dismissed. No challenge to the sentence was brought.

SENTENCING FACTORS

219. The legislative regime that applies to the sentencing of this offender is found in Part 1B of the *Crimes Act 1914* (Cth). Subsection 16A (1) mandates that the sentence imposed must be *"of a severity appropriate in all the circumstances of the offence*". Subsection 16A (2) sets out a non-exhaustive list of matters that must

be taken into account in determining the appropriate sentence. I will deal with the factors relevant to the offender's circumstances.

Nature and circumstances of the offence

220. S. 16A (2)(a) requires consideration to be given to the *"nature and circumstances of the offence"*. I have earlier described in some detail the factual circumstances of the offence. There are a number of features of the offence and the offender's conduct that warrant the conclusion that this case is properly to be described as a "*grave instance"* of conspiring to defraud the Commonwealth.

221. The court is required to give consideration to the maximum penalty prescribed by Parliament as an indicative *"yardstick"* in determining the appropriate penalty. The maximum penalty is reserved for the *"worst category"* of offences and once it is recognised that an offence falls properly within that description, it is beside the point that it may be possible to conceive of an even worse instance of the offence (***Veen [No 2]*** [1988] HCA 14; (1988) 164 CLR 465 at 478 per Mason CJ, Brennan, Dawson and Toohey JJ). However, the High Court has made it clear that the use of such a description is to be avoided where an offence is not so great as to warrant the imposition of the maximum prescribed penalty (see: ***The Queen v Kilic*** [2016] HCA 48; 259 CLR 256, at [18]-[20]).

222. Factors that justify the conclusion that the present matter is indeed a grave instance of conspiring to defraud the Commonwealth include the actual loss, and the risk of further loss, which was caused or intended to be caused to the Commonwealth. The actual loss in terms of monies paid by the Commonwealth pursuant to the fraudulent activity of the conspirators was $19.25 million. The conspiracy itself, and giving effect to its aim, namely defrauding the Commonwealth under the Pharmaceutical Benefits Scheme, was an ongoing course of conduct. An additional number of claims had already been prepared and were intended to be submitted and the criminal scheme was likely to have continued into the future, but for the unanticipated intervention by what was described as the "*eagle-eye*" of the Vitaflo executive, who effectively stumbled on the circumstance that the Commonwealth had reimbursed many millions of dollars for their drugs which was well in excess of the value of the drugs that they had in fact supplied.

223. A second relevant factor is the effective position of trust in which the processes of the Pharmaceutical Benefits Scheme placed pharmacists such as the offender and his co-conspirator, the absent Mr Youssef. Whilst there was a possibility of a random audit, the evidence clearly indicated that the Scheme depended for its efficacy on the honesty and integrity of subscribing pharmacists. The offender used his knowledge of the operational procedures and systems to give effect to the aims of the conspiracy.

224. The offender was at least equally culpable with his partner in the pharmaceutical business and co-director, Jacob Youssef. I am not able to be satisfied beyond reasonable doubt that he was more culpable than his co-conspirator.

225. These various factors contribute to my determination that the present matter falls well above a mid-range of objective seriousness and indeed approaches the most grave instances of such offending. It does not, however, in my view warrant the maximum prescribed penalty (see ***Kilic*** at [18]-[20]).

Course of conduct

226. Subsection 16A(2)(c) requires the Court to consider whether the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character. I am of the view that this is a relevant factor to be taken into account. The execution or implementation of a continuing agreement to defraud the Commonwealth forms part of a course of conduct in which individual acts of defrauding are themselves criminal acts. The repetition of these individual acts of defrauding comprise a series of criminal acts of the same or similar character. This subsection of section 16A requires the court to give

consideration to the circumstance that an ongoing course of conduct may itself be constituted by a series of individual criminal acts.

227. The subsection, in my view, is intended to require a court to give consideration to the circumstance where a single charge may reflect, for example, a rolled-up charge where repeated defrauding of, for example, the Social Security Department (as it was previously called), might be charged as a single offence rather than as a series of repeated individual offences. The offender is not to be punished for committing separate acts of dishonesty which have not been individually charged and in respect of which he has not been convicted. However, the individual acts of defrauding pursuant to the ongoing agreement between the co-conspirators have, in the present case, been identified with precision and particularity. Such identification permits this court to be satisfied that the ongoing course of conduct is a relevant factor to be taken into account in the overall instinctive synthesis. (cf. ***R v Anthony James Dickson (No 18)*** [2015] NSWSC 268 per Beech-Jones J, at [109])

Injury, loss or damage

228. Subsection 16A(2)(e) requires the Court to consider *"any injury, loss or damage resulting from the offence".* I have referred earlier to the detail of the actual loss by way of payments incurred by the Commonwealth made pursuant to the Pharmaceutical Benefits Scheme as a consequence of the fraudulent claims which were submitted.

229. A fraud on the revenue of the Commonwealth impacts "*all other taxpayers who lawfully pay what is due for the maintenance of our governments, their institutions and services for the common good*" (per Dunford J; Beazley JA and Wood CJ at CL agreeing, ***Stitt v R*** (1998) 102 A Crim R 428 at 430).

230. As described by McClure P in ***R v Host*** [2015] WASCA 23 at [24]:

"…the real victims of such conduct are the members of the Australian community as a whole because it reduces the funds available for essential and other services and increases the taxation burden on honest taxpayers."

231. It is to be observed that there are also hidden and unrecoverable costs which are incurred in the course of administering the Pharmaceutical Benefits Scheme and Medicare and which arise in compliance, audit and investigation systems which are necessary to protect the revenue from, and to detect, fraudulent and other dishonest conduct (per McClure P in ***Host*** at [24]).

232. In the ordinary course, an assessment of damage or loss caused by the offence would require an assessment of the ability of the Commonwealth to recoup the whole or part of the defrauded amounts. Indeed, a submission to that effect has been urged by Senior Counsel for the offender.

233. However, the court is aware that proceedings are on foot pursuant to the *Proceeds of Crime Act 2002* (Cth) and s 320 of that Act prohibits a court in passing sentence to have any regard to a forfeiture order that relates to the offence to the extent that the order forfeits proceeds of the offence and similarly to not have regard to any pecuniary penalty order that relates to the offence. The apparent inconsistency between the requirements of s 16A(2)(f) of the *Crimes Act 1914* (Cth) and s 320 of the *Proceeds of Crime Act 2002* (Cth) has been the subject of detailed analysis by McClure P in ***Host***.

234. The reasoning of President McClure was accepted by the NSW Court of Criminal Appeal per Basten JA; Johnson and Davies JJ agreeing, in ***R v Jafari*** [2017] NSWCCA 152. Section 320 of the Proceeds legislation does, however, permit a sentencing court to have regard to any cooperation by the person in resolving any action taken against the person under that Act. For the reasons advanced by the Crown in its written submissions, I am not satisfied, on the basis of the material before me, that there have been actions taken by the offender by way of voluntary restitution or otherwise to warrant any additional consideration of cooperation in this regard.

235. I accordingly accept that in giving consideration to the specific factor of loss or damage, I am bound by authority which requires recognition that the provisions of s 320 prevail in the determination of injury, loss or damage.

The degree to which the person has shown contrition

236. Subsection 16A(2)(f) requires the court to take into account the degree to which an offender has shown contrition by taking action to make reparation or in any other manner by which they have demonstrated contrition. Contrition is a term which stresses the sorrowful regret that constitutes true penitence. Penitence itself is the action of feeling or showing sorrow and regret for having done something wrong. The proposition that someone may exhibit remorse or contrition for something which they deny having done is a legal conundrum, and perchance a philosophical one, with which the courts regularly have to deal.

237. I have no doubt that the present offender is remorseful for the position in which he has placed his family and himself by his actions. However, he continues to deny any complicity in the conspiracy to defraud the Commonwealth.

238. It has been advanced on behalf of the offender that he intentionally retained funds within the bank accounts of either the pharmaceutical practice or his own, following the execution of the search warrant in March 2015, with the intention that he was preserving such funds to the advantage of the Commonwealth. I should make it clear that I do not accept any such motive. I am not satisfied on the balance of probabilities that such was the offender's intention. He was at that time, in my view, motivated by self-preservation. However, putting to one side his motivation, the fact that his action of not accessing or dispersing the funds which remained in the bank account, prior to the order freezing those funds, had the practical result that in due course they were able to be retrieved by the Commonwealth. In my view this factor is more relevant for consideration with respect to the ultimate loss or damage referred to in subsection 16A(2)(e).

Cooperation with law enforcement agencies

239. Subsection 16A(2)(h) has application in the present matter, notwithstanding the maintenance of the plea of not guilty and the offender's continuing protestations of his innocence.

240. [Suppressed]

241. [Suppressed]

242. [Suppressed]

243. I do not propose to go into a detailed exposition with respect to the assistance which has been provided: see ***Greentree v R*** [2018] NSWCCA 227. It relates to systems and methodology. It does not relate to a specific prosecution, nor does it involve the giving of evidence. Its significance is not diminished by virtue of the motivation to provide it, which I am of the view is one of self-interest: see ***R v Cartwright*** (1989) 17 NSWLR 243.

244. I am aware of the wide discretion in determining an appropriate discount and am familiar with the expressions of principle that such a discount is not capped at a notional 25%: see ***Z v R*** [2014] NSWCCA 323 per McCallum J at [29]-[34]. However, in the present matter, I propose to allow an identifiable discount of 20%.

Specific deterrence

245. Subsection 16A(2)(j) requires the court to consider the "*deterrent effect that any sentence or order under consideration may have*" on the offender. In the Crown's submission, the limited evidence of genuine remorse or contrition requires greater weight to be given to the personal and specific deterrence in the sentence to be imposed. The Crown submits that there is a need to impose a sentence which in fact has the effect of deterring the offender from committing such an offence or similar offences in the future. The Crown submits that although it is likely that the offender will be precluded from readmission as a registered pharmacist, he is not precluded from working in a pharmacy in other roles, nor in such circumstance being presented with opportunities to engage in similar criminal conduct.

246. The evidence at trial clearly demonstrated that "pharmacy assistants" and "dispensing technicians" could handle prescriptions and access prescription medications, dispensing computers and other requisite system requirements. The complicit conduct by Youssef's sister, Zeinab, was illustrative of such opportunity being able to be taken by a non-pharmacist.

247. On behalf of the offender, the psychiatric assessment of his diminished likelihood of reoffending is said to be significant.

248. Notwithstanding the recognised diminished likelihood of reoffending as a general proposition by so-called "*white-collar criminals*", there is clearly a need for proper consideration of specific deterrence in the present matter.

General deterrence

249. Subsection 16A(2)(ja) requires the court to consider "*the deterrent effect that any sentence or order under consideration may have on other persons*." The need for general deterrence in sentencing for "*white-collar offences*" has been repeatedly emphasised by appellate courts. Similarly, defrauding social security, taxation, Medicare and other predominantly Commonwealth social service provisions have attracted firm judicial statements of principle with respect to appropriate general deterrence. As long ago as 1984, in ***R v Van Tung Luu*** (unreported, NSWCCA, 7 December 1984), Street CJ stated:

"The courts of this State have uniformly sought to make plain to persons who abuse the system of social welfare that they must expect to face heavy penalties. The introduction into the administration of that system of overly meticulous preliminary checks before benefits are paid could result in real hardship to persons whose need for benefits is urgent and immediate. Thus it is that such susceptibility is open to abuse, which results in persons who do abuse it receiving salutary penal consequences at the hands of the courts."

250. Similarly, Sheller JA said in 1988, in ***DPP v Hamman*** (unreported, NSWCCA, 1 December 1988) at 30-31:

"General deterrence is a predominant consideration when sentencing for offences of defrauding the revenue…"

251. There are a veritable multitude of cases in which similar expressions of principle may be found. The comments of Keane JA in ***R v Price*** [2008] QCA 330 involving a medical practitioner who provided unauthorised prescriptions to patients for drugs that attracted PBS subsidies are, however, worthy of repetition. His Honour said at [26]:

"…crimes which involve a deliberate decision to abuse governmental arrangements for the provision of social welfare are crimes of calculation. It is not at all unreasonable to suppose that in this field of conduct potential offenders may be deterred from offending by calculating the prospect of punishment…the imposition of penalties is the only way to deter "those minded to defraud governmental agencies" from engaging in this kind of activity."

252. General deterrence is a significant factor in consideration of the appropriate sentence in the present matter. I do, however, note that the matters required to be taken into account pursuant to s 16A(2) "*are not set out*

in a hierarchy of importance or significance" (see Bell CJ in ***Totaan v R*** [2022] NSWCCA 75 at [83] and [100]).

Adequate punishment

253. Subsection 16A(2)(k) requires the court to ensure that an offender "*is adequately punished for the offence.*" A determination of adequate punishment will be tempered and influenced by the various identified factors including the objective assessment of the seriousness of the offending and the offender's subjective circumstances.

Subjective circumstances of the offender

254. Subsection 16A(2)(m) requires the court to consider the "*character, antecedents, background and physical or mental condition of the offender*." The offender is now 38 years of age and has no prior criminal history. Prior good character assumes less significance as a mitigating factor where there has been systematic defrauding of the revenue and where conduct has been a course of conduct over an extended period of time (see ***Ly v R*** [2014] NSWCCA 78 per Leeming JA; Hall J and Schmidt J at [86]). In the present matter, the offending continued for more than 12 months and the position of trust and responsibility occupied by the offender as a pharmacist authorised to make claims on the Pharmaceutical Benefits Scheme was instrumental in his ability to commit the offence.

255. His background and subjective circumstances as set out in the psychiatric report are of little significance in reducing his culpability. His abuse of drugs, however intermittent during his adult life, would appear to have escalated after the search of the pharmacy in 2015 and after the cessation of his criminal conduct.

Prospects of rehabilitation

256. Subsection 16A(2)(n) requires consideration of the offender's prospect of rehabilitation. An assessment of an offender's prospects of rehabilitation is often difficult in the case of an offender who has resolutely denied any wrongdoing. I take note of the assessment of his likely reoffending in the psychiatric report which has been tendered and will give appropriate consideration to his prospect of rehabilitation. In my view, such prospects must carry a degree of reserve in light of his maintenance of a denial of culpability.

Probable effect on the offender's family

257. Subsection 16A(2)(p) requires that a court must take into account the probable effect that any sentence would have on the person's family. A long line of authority which effectively grafted the common law requirement that "*exceptional hardship*" be required to be demonstrated before taking into account the probable effect of a sentence on family members, has been determined to be an error and contrary to the clear statutory intention in the mandatory provisions of s 16A(2). The Chief Justice, Bell CJ, with whom Gleeson JA, Harrison, Adamson and Dhanji JJ agreed, in ***Totaan v R*** said at [82]:

"Not only is there no textual support in s 16A for the requirement that exceptional circumstances be shown or established, the "requirement" to demonstrate "exceptional hardship", as grafted on to s 16A(2)(p) by the series of cases under challenge, in fact runs contrary to the language of the subsection, which provides that the probable effect of the sentence on family members and dependants "must" be taken into account. The gloss defeats this clear statutory direction in all cases other than those which satisfy the somewhat elusive epithet of being "exceptional"."

258. His Honour's detailed and extensive analysis of the way in which s 16A(2)(p) had been wrongly restricted over some two decades not only explains how such a misconception arose, but illustrates with clarity why it was wrong. The probable and actual effect on Mr Zoghbi's family is set out in the material tendered in the defence case and is a factor which requires appropriate consideration in the instinctive synthesis.

Other relevant factors: Extra-curial punishment

259. It is accepted that loss of career and professional reputation is capable of amounting to a form of "*extra-curial*" punishment (see ***Ryan v R*** [2001] HCA 21; (2001) 206 CLR 267 at [54] per McHugh J). However, as discussed earlier, the offender's professional position as a pharmacist provided the opportunity and facilitated his ability to commit the offence. The loss of his professional career is the inevitable result of his breaches of trust as a pharmacist. Whilst to be taken into account, it carries little weight in an appropriate determination of a proper sentence.

Other relevant factors: Delay

260. There was a period of some 3 years 4 months between the time of the offending and the commencement of the prosecution. The prosecution commenced in July 2018 and the matter thereafter proceeded to trial reasonably expeditiously. The subsequent delay in passing sentence was brought about by a number of factors some of which related to matters advantageous to the offender whilst others arose because of the vicissitudes of circumstances in the District Court.

261. The delay does not approach the length of delay in ***R v Cox; R v Cuffe; R v Morrison*** (supra at [169]) but is, nonetheless, a factor to be given consideration. The Crown submits that any delay has not been unreasonable or inordinate. The defence submits to the contrary and submits that it is a factor that should lead to amelioration of the appropriate sentence. I propose to give some weight to this factor in a determination of the non-parole period.

DETERMINATION

262. I have come to the view that the objective seriousness of the offending would require a starting point of 8 years. Taking into account the factor required pursuant to s 16A(2)(h), an appropriate discount of 20% leads to a head sentence of 6 years 4 months.

263. In determining an appropriate non-parole period, I have had regard to the "customary" ratio with respect to Commonwealth matters and also to particular subjective features, including the delay in both commencing proceedings and in the passing of sentence. I have also had regard to the hardship to the offender's family, including his children. I set a non-parole period of 4 years.

264. The sentence and non-parole period will commence when he went into custody, namely 23 April 2021. The non-parole period will accordingly expire on 22 April 2025.

265. Mr Zoghbi, I am required by s 16F of the Crimes Act (Cth) to explain to you the sentence which I have imposed. That sentence is for a period of 6 years and 4 months which will commence on 23 April 2021 and expire on 22 August 2027. I have fixed a non-parole period of 4 years imprisonment which will expire on 22 April 2025. That means you will be imprisoned for not less than 4 years from the time that you went into custody. If you are granted parole at the end of that time, or before the expiration of the head sentence, you will serve the balance of the sentence in the community. If you are granted parole, the order will be subject to conditions which will be determined by the relevant parole authority which may subsequently be amended or revoked. If you fail, without reasonable excuse, to comply with the conditions of your parole, your parole may be revoked and you may be taken back into custody.

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